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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 108.

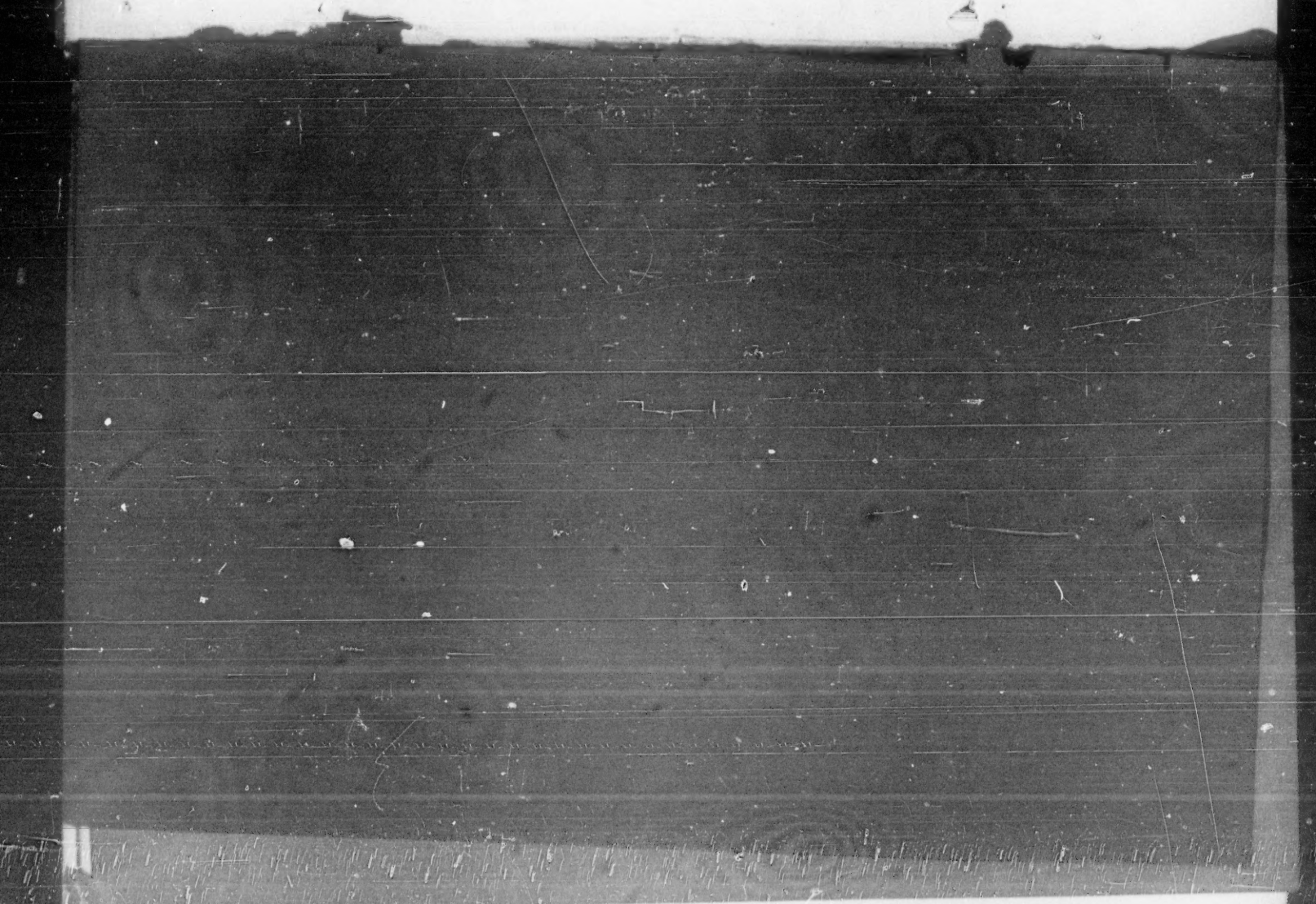
THOMAS KEELY, PLAINTIFF IN ERROR,

vs.

XENOPHON B. SANDERS, CALVIN L. STORY, AND ELIZA MARGARET STORY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

FILED APRIL 15, 1876.



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1 THE STATE OF TENNESSEE:

Pleas before the supreme court of the State of Tennessee, for the western division, at Jackson, on the 4th Monday in September, A. D. 1875.

Present, Hon. A. O. P. Nicholson, chief justice, and Robert McFarland, Thomas J. Freeman, James W. Deaderick, Peter Turney, and John L. T. Sneed, associate judges.

Be it remembered that heretofore, to wit, on the 14th August, 1875, the following transcript of a record was filed in the office of the clerk of the supreme court for the western division of said State, at Jackson, to wit:

X. B. SAUNDERS
vs.
JNO. KEELY ET AL.

First chancery court of Shelby County.

2 STATE OF TENNESSEE,
Shelby County, ss:

No. 1269, N. R. D.

Pleas before the honorable R. J. Morgan, chancellor of the first chancery court of Shelby County, held in the city of Memphis and State and county aforesaid, and at the April term thereof, 1875.

Be it remembered that heretofore, to wit, on Oct. 11, 1866, Xenophon B. Saunders et al. filed bill of complaint against John Keely and W'm M. Perkins in the chancery court of Memphis, in the words and figures following, viz:

To the Hon. W'm M. Smith, chancellor of the Memphis chancery court.

XENOPHON B. SANDERS, CALVIN L. STORY, and Eliza Margaret Story, citizens of the State of Texas, complainants,
vs.
THO'S KEELY AND W'M. M. PERKINS, CITIZENS of Shelby County, Tenn., defendants.

3 Original bill.

The complainants show unto the court, respectfully, that in the year 1846 M'r's Miriam L. Saunders departed this life domiciled in Shelby County, Tennessee, leaving a last will and testament, which was admitted to probate in due form in the Shelby County court at its July term, 1846. In said will she desired her debts to be first paid by the sale of a certain piece of real property in Memphis, known as the Mississippi House property, and the rent of her home place of about two and a quarter acres in Memphis, on Alabama and Market streets, being lots 19 and 3 on the plan of said town, and so described in the conveyance to her by the Tuckers and Trezevant, now of record.

That one Littleton Henderson was duly appointed by the county court of Shelby, at its July term, 1846, as administrator with the will
4 annexed of M. L. Sanders, and qualified and acted as such.

That in January, 1853, said Henderson, as such administrator,

filed his petition or bill in this court, alleging that the personal estate of M. L. Sanders had been exhausted in the payment of debts, that the Mississippi House property and slaves had all been sold, and that there still remained a balance of debts unpaid; that the only remaining property belonging to the estate was the home place aforesaid, lots 19 and 3, and he asked the court to sell the same to complete the payment of the debts.

This court takes jurisdiction of the matter, orders process against the devisees and heirs of M. L. Sanders, orders the creditors to file
5 their claims before the clerk & master, orders him to audit the same and report, and finally decrees a sale of said lots to pay debts; the case goes to the supreme court by appeal, is affirmed and remanded for execution.

The orders of this court operated as an injunction against all creditors.

The court having taken the control over and custody of the said lots, the owners of the same had no right or authority or duty to look after, or in anywise interfere, and could not do so, as the property was in custodia legis.

Such being the case, in the year 1864, on the day of , the same was unlawfully sold by persons styling themselves U. S. direct-tax commissioners, and the same was bid off by one John Gunn for the sum of $450, who afterwards transferred without recourse his bid
6 to the defendant Keely, and has now no interest in said property, never having received a deed to the same; and the plaintiffs being in the exclusive possession and enjoyment of said property, the said Keely is unlawfully setting up claim thereto under his purchase of the bid of John Gunn, and the sale for taxes aforesaid, and is threatening to sue, harass, and to turn complainants out of possession by means of a writ to be issued by said commissioners, under an act of Congress to that effect, and thereby is bringing the title of plaintiffs in great dispute, and thereby throws a cloud over the same.

Plaintiffs say that defendant Perkins also claims a portion of said
7 lots 19 and 3, first by a purchase from the devisees of M. L. Sanders of one-fourth of the whole in 1858, and afterwards by a purchase at a sale of the clerk & master, made under a decree of this court in the Henderson suit aforesaid, of a fractional part of the same, being lot No. 6 of a subdivision made by the clerk & master for the purposes of sale in the year 1859, but to set aside which purchase and pretended purchase of one fourth a bill is now pending in this court of recent origin, by the devisees of M. L. Sanders against Perkins for fraud in the purchase.

They aver that they have the legal and perfect title to the property in question, unquestionably to all (save the part claimed by Perkins, but whose title is denied as aforesaid), subject to such trusts, liens, and encumbrances as may be and have been declared in favor of the
8 creditors of M. L. Sanders' estate by this very court in the Henderson case, which is yet pending and has been continuously since 1853, under the will aforesaid, a certified copy of which will be filed in due time as evidence and part of this bill, the original not being in their possession.

In 1858 Napoleon Sanders died unmarried and without children, and his interest under the will passed to his surviving brothers and sister named in the will, and in 1864 Joel Sanders also died without issue, never having been married, and his interest under the will passed to the complainants, the only surviving devisees, it being provided by said will that in the event of the death of Xenophon, Joel, Napoleon, or Margaret

without children, his or her interest to pass to the survivors, the
9 said Margaret, now Margaret Story by marriage with complainant, Calvin L. Story, and Xenophon being the only survivors as aforesaid.

Complainants further show that at the time of the tax sale aforesaid they were non-residents, living in the State of Texas, and had been so living for many years previous thereto. They never had notice of said taxes, and could not have had, nor of the sale of the property. The' now aver that the sale of the property was inequitable and null and void, for the following reasons, among others:

1st. The property was in custodia legis by a lis pendens, and under the orders of the court made therein all creditors, individual, State, and Federal, were enjoined from selling the same or interfering with
10 the same, except by leave of the court first had and obtained. The court had taken the control and management from the complainants, the owners, by its orders, and was administering upon the same to enforce trusts and encumbrances in favor of creditors at and during the time the said sale was made, and said sale in contempt of the authority and jurisdiction of this court.

2nd. The property is misdescribed in the publication, orders of sale, and the sale itself. It was described as country lot 506, when in fact and in truth the property is known, and was at and before the sale, as lots Nos. 19 and 3. It was so conveyed to M. L. Sanders 30 years ago, and has been so known and recognized ever since. The
11 same was otherwise misdescribed, and

3rd. No legal or proper notice of the sale of lots 19 and 3 was ever made or given by advertisement or otherwise.

4th. The taxes pretend*end*ed to be due to the U. S. were only $10\frac{50}{100}$, and the whole property was sold for $450.00.

5th. The taxes being only $10\frac{50}{100}$, and the property being susceptible of any number of subdivisions, it was the duty of the commissioners to have sold only so much as was necessary to pay the taxes. But plaintiffs aver that no efforts were made to do so, in fraud of their rights, and property worth between $50,000 and $100,000 was fraudulently sold for $450.00.

6th. Plaintiffs having heard of said tax sale within the last
12 ninety days, asked Perkins why he, being a claimant of part of the property in 1864, and living in Shelby County, did not pay off the taxes or redeem it. He replied that although living at Germantown, 12 miles from the city of Memphis, in Shelby County, and loyal to the U. S., he could not get a permit from the U. S. military authorities to come to the city to pay the taxes before the day of sale, and that after the sale on the first opportunity he came to the city with the money to redeem within the time allowed by law to redeem, when he found the commissioners who made the sale all absent from the city with
13 all their books and papers, and no agent or officer left here to receive the redemption money, and there was no safe communication by travel or otherwise to Nashville or anywhere else outside the limits of the city of Memphis, owing to flagrant civil war, and on the authority of Perkins, one of the claimants of said property, the above facts are declared to exist.

7th. When said tax sale was made the military authority of the U. S. was not established in and over the county of Shelby, State of Tennessee, nor was it established in any one county as required by law.

8th. The acts of Congress under which the sale was made are unconstitutional, null, and void.

9th. The assessment of taxes made under them on property in
14 Tennessee, and plaintiffs' property in particular, are partial, excessive, erroneous, irregular, oppressive, and void.

10th. That said sale and all others made in the year 1864, in the city Memphis, were not fair and bona fide, were not made with the simple purpose of securing and collecting the taxes due the government, but were made with the design to oppress and deprive the owners of the same unfairly and unlawfully.

The plaintiffs aver they have always been ready and willing to pay all taxes due on said property; and the same in this case would have been paid if they had had any notice whatever of the existence of the same; and this court would also have ordered the payment of
15 the U. S. taxes, if they had been presented, as they should have been, as the other taxes have been; and they state that this is their first and only application for an injunction. Plaintiffs aver that said sale was otherwise illegal, fraudulent, oppressive, and unjust, as will appear by the proof to be taken in the case. They aver that they have cause to fear that, unless restrained by injunction, the defendant Keely will fraudulently procure a writ of possession to issue against them and their tenants, who are in actual possession, and disturb them in their quiet enjoyment of said property, which is all the property left them by their mother, M. L. Sanders, and will also annoy them by other unlawful proceedings, by suit or otherwise. Wherefore they pray for
16 the writ of injunction against Keely, restraining him from applying for or obtaining, either in his own name or any other for his use, any writ of possession against the plaintiffs or their tenants, and restraining him from any other proceeding by law or otherwise touching said property, or from interfering in any way with the same, until permitted so to do by this court; that he and Perkins be made defendants to this bill; process issue; answer be compelled, but the answers of each under oath are hereby expressly waived; and on final hearing plaintiffs pray that the will of M. L. Sanders be construed, that the title to lots 19 and 3 be declared to be in them, subject to the decrees to be made hereafter between the complainants and Perkins as to the part of
17 said property claimed by him in the chancery cause pending, by very recent filing, in the case of Story & Wife versus Perkins and Xenophon Sanders; that the tax-sale be declared null and void; that the cloud upon their title caused by Keely's claim be removed, and that the same be surrendered up and cancelled, and he be perpetually enjoined from the assertion of any right under it.

Sol's for Compl'ts.

STATE OF TENNESSEE,
Shelby County:

Personally appeared before me, Augustus Alston, clerk & master of the Memphis chancery court, Robert Weir, agent of the complainants to the foregoing bill, who are absent from this State, and made oath in due form that the statements in the foregoing bill of his own knowledge made are true, and those made upon information he believes to be true.

18 (Signed) RO. WEIR.

Subscribed & sworn to before me by Robert Weir, agent, this 10th day of October, 1866.

BENJ. COLEMAN,
Dep. Clk.

Order of chancellor.

Upon bond, with security, being given in the sum of $2,500.00, the clerk & master will issue writ of injunction, in pursuance of the prayer of the foregoing bill.

Oct. 11th, 1866.

W'M. M. SMITH,
Chancellor.

Injunction bond.—Filed Oct. 11th, 1866. A. Alston, C. & M.

We, Xenophon B. Sanders, Calvin L. Story et al., and R. B. Mitchell, surety, acknowledge ourselves indebted to Tho's Keely, W'm M.
19 Perkins, et al., mentioned in the bill, in the sum of twenty-five hundred ($2,500) dollars.

The condition of the above bond is such, that whereas the said Xenophon B. Sanders, C. L. Story, & Eliza M. Story, complainants, this day filed their bill in the chancery court of Memphis against the said John Keely, W'm M. Perkins et al., defendants, and obtained an order for the issuance of the writ of injunction, in accordance with said order, upon the execution of this bond.

Now, if the said complainants shall comply with and perform the orders and decrees of the court in case said injunction be dissolved, and shall pay to said defendants such damages as shall be awarded to or recovered by them for the wrongful suing out of the injunction, and also such
20 costs as may be awarded to them by the court, then this obligation to be void.

Witness our hands and seals this 11th day of October, 1866.

XENOPHON B. SANDERS. [SEAL.]
CALVIN L. STORY. [SEAL.]
ELIZA MARGARET STORY,
By RO. WEIR, *Ag't.*
R. B. MITCHELL. [SEAL.]

Cost bond.—Filed Oct. 11th, 1866. A. Alston, C. & M.

We, Xenophon B. Sanders, Calvin L. Story et al., and R. B. Mitchell, acknowledge ourselves indebted to Tho's Keely, W'm M. Perkins et al., mentioned in the bill, in the sum of two hundred and fifty dollars, to be void if the said Xenophon B. Sanders, Calvin L. Story et al. complainants in a bill which has this day been filed in the chancery court
21 of Memphis against the said John Keely et al., shall pay all such costs as may be awarded against them by the court in its decrees and orders in said bill. This 11th day of October, 1866.

XENOPHON B. SANDERS.
CALVIN L. STORY. } [SEAL.]
ELIZA MARG'T STORY,
By RO. WEIR, *Ag't.*
R. B. MITCHELL. [SEAL.]

Writ of injunction.—Issued 12th day of Oct., 1866. A. Alston, C. & M.

The State of Tennessee to Tho's Keely, agents and attorneys, greeting:

Whereas Xenophon B. Sanders, Calvin L. Story, and Eliza M. Story have lately exhibited their bill of complaint in the chancery court of

Memphis against you, the said Tho's Keely, and W'm M. Perkins, as defendants therein, and obtained from the honorable W'm M.
22 Smith, judge, &c., that writs of injunction do issue according to the prayer of said bill:

We therefore, in consideration of the premises, do strictly enjoin and command you, the said Tho's Keely, and all and every the persons before mentioned, and each and every of you, do absolutely desist and refrain from applying for or obtaining, either in your own name or any other for your use, any writ of possession against the complainants or their tenants, and you are restrained from any other proceedings, by law or otherwise, touching or interfering in any way with property known as lots Nos. 19 and 3, in Memphis, on Alabama and Market streets (having been misdescribed as lot No. 506 in a publication for tax sale formerly, said property having been conveyed by Tuckers & Trezevant to M. L. Sanders, until the further order of our said court to
23 the contrary. And this you shall in nowise omit under the penalty prescribed by law.

Witness Augustus Alston, clerk and master of the chancery court at office in city of Memphis the second Monday in May, 1866, and 90th year of American Independence.

A. ALSTON, *C. & M.*,
By R. J. BLACK, *D. C. & M.*

Return on writ.

Came to hand 12th day of October, 1866, and executed same day on Tho's Keely by reading to him the contents of this injunction.

P. WINTERS, *Sheriff*,
By G. W. FISHER, *Dep't Sh'ff.*

Answer of Tho's Keely.—Filed Nov. 15th, 1866. A. Alston, C. & M.

The separate answer of Tho's Keely to a bill of complaint filed
24 against himself and W'm M. Perkins in the chancery court of Memphis, by Xenophon B. Sanders and others.

The said defendant, for answer to said bill or to so much thereof as he is advised it is material for him to answer, says that he knows nothing of the will of M'r's Miriam L. Sanders, or who administered upon her estate; he knows nothing of the suit pending between the heirs of said M. L. Sanders and W. M. Perkins, but, if necessary in the investigation and final determination, he requires full and strict proof of the same, this respondent neither admitting nor denying the same; he does not know who were the heirs of said M. L. Sanders, which are dead and which are living, nor does he know the heirs or representatives of those that
25 are dead, but if the same should affect his interest in this cause, he requires full and strict proof thereof as to whether the ground in controversy was in the custodia legis or not in 1864, when the same was sold for taxes, nor as this respondent is advised, is it material, as taxes are to be paid, and the necessities of the State cannot wait upon the process of litigation to secure its dues.

He states that it is true that the said property was bid off by the said John Gunn at a tax sale of the United States commissioners in the year 1864, and that the said sale by regular, legally constituted officers for that purpose under the laws of the United States, who had the right and whose duty it was upon the failure of the parties interested to pay the tax to sell property and make the tax, and that your respondent by

transfer became the bidder in place and stead of said John Gunn,
26 and his request and direction, and received from the commissioners upon payment of the purchase money a certificate of purchase, which is herewith filed, marked "A," and made a part of this answer. Your respondent denies the allegation in complainants' bill that the said lot purchased by him was not lot (506), two (2) acres, as called for in his certificate of purchase, but charges that said land is known upon Rucker's map of the city of Memphis as lot No. 506, and assessed in the assessor's book of 1860 as lot No. 506. Your respondent does not know what portion of said lot belongs to or is claimed by W. M. Perkins, but if he claims any part or owns any part the same was subject to tax,
27 and when sold belonged to the purchaser.

Your respondent denies the allegation in complainants' bill that the pendency of a suit is an injunction against the officers of the government for selling property for taxes due. He denies that there was a misdescription of said property in calling it lot 506, but reiterates that it was upon the map recognized as the correct map of the city of Memphis, and so assessed to Sanders and Perkins in 1860. He denies the allegation that no legal or proper notice of the sale of said lots was given by advertisement or otherwise, but charges that the same was duly and legally advertised; that he does not know what amount of taxes was due to the United States on said property, but if only the amount of $10\frac{50}{100}$ it was an easy matter to pay the tax and keep it from sale altogether.

28 He denies that it was the duty of the commissioners to have divided said property, and sold only so much of said property as was necessary to pay the taxes, and respondent thinks that 25 or $30,000 would be a liberal price or value upon the property. Respondent knows nothing of the reputed statements and conversation between complainants and Perkins, but denies that any failure upon the part of complainants or Perkins, or removal of the commissioners, or by reason of a flagrant civil war and a consequent failure to pay the tax can operate to the prejudice of your complainant, but if such things can affect his rights he denies such allegations and requires strict proof thereof. He denies the allegation in complainants' bill that when said tax
29 sale was made the military authority of the United States was not established in or over the county of Shelby, State of Tennessee. He denies that the acts of Congress, under which the sale was made, are unconstitutional, null, and void.

He denies that the assessment of taxes made under the said acts in Tennessee, and on complainants' property in particular, are partial, excessive, erroneous, irregular, oppressive, and void. But he says that the said acts were constitutional, legitimate, and binding upon the whole people of the United States, and in passing said acts the Congress of the United States acted only within the sphere of its legitimate authority.

He denies the allegation in complainants' bill that said sale and all others made in the year 1864 and in the city of Memphis, were
30 not fair and bona fide, were not made with the simple purpose of securing and collecting the taxes due the government, but were made with the design to oppress and deprive the owners of the same unfairly and unlawfully.

He denies that the complainants have always been ready and willing to pay taxes; but charges that said property has been frequently sold for taxes, as appears by the tax collector's books of the city of Memphis. Complainants have paid no taxes upon said property since 1861.

This respondent claims that the certificate of purchase under the United States tax sale, and the certificate Exhibit A are sufficient evidences of the regularity and validity of the sale of said property;
31 and he offers the same as a complete bar to complainants' rights in this cause, upon the ground that said property was subject to taxes, that the taxes were not paid previous to sale, and the same had not been redeemed by the provision of the different acts of the Congress of the United States.

He asks that said injunction be dissolved, and that his rights to said property be declared, and a title be decreed to him; and, having fully answered, he asks that said bill be dismissed with costs, &c.

DIXON & AVERY,
For Def't Keely.

EXHIBIT A.

UNITED STATES OF AMERICA:

Tax-sale certificate, No. 1054.

This is to certify that at a sale of lands for unpaid taxes, under and by virtue of an act entitled "An act for the collection of direct
32 taxes in insurrectionary districts within the United States, and for other purposes," and the act amending the same, held pursuant to notice at Memphis, in the county of Shelby and the State of Tennessee, on the twenty-fourth day of June, A. D. 1864, the tract or parcel of land hereinafter described, situate in the county of Shelby and State aforesaid, and described as follows, to wit, Market street and Thornton avenue, part of country lot five hundred and six (506), two (2) acres, assessed to Sanders and Perkins in 1860, fifth civil district, city of Memphis, was sold and struck off to Thomas Keely for the sum of four hundred and fifty dollars and cents, he being the highest bidder, and that being the highest sum bidden for the
33 same; the receipt of which said sum in full is hereby acknowledged and confessed.

Given under our hands, at Memphis, this twenty-fourth day of June, A. D. 1864.

E. P. ————,
J'N B. RODGERS,
DELANO S. SMITH,
Commissioners.

Deposition of W'm M. Perkins.—Filed April 8th, 1875. E. A. Cole, C. & M.

Interrogatory 1st, by H. Clay King, for complainants:

Int. 1. State your age and residence.

Ans. I am 58 years old, and reside in Shelby County.

Int. 2. Are you interested in the property in contest? If so, state what interest you own in the property.

Ans. 2. I own the whole of lot No. 6, and one-fourth of the whole.

Int. 3. State the true description of the property on the plats,
34 maps, and title-papers of said property at the time it is alleged to have been sold for United States taxes in 1864.

Ans. 3. This property was a part of country lot No. 506, only a fractional part; on the division of country lot No. 506 into city lots, long

prior to the war, portions of lots 19 & 3 of the city lots fell to the heirs and devisees of M. L. Sanders, dec'd, and this property has been known and recognized ever since the division as parts of lots 19 and 3—and I believe it so appears of record in this court in case of Littleton Henderson, administrator of Mrs. Sanders against her heirs, devisees, and creditors—and my impression is, that part of these lots 19 and 3 were further subdivided in that case into eight or nine lots, and the record and maps and plats in that case will show the true facts as they
35 are, and I here refer to them for certainty, and adopt the same as parts of my deposition.

Int. 4. Was this property in litigation in the case of Henderson vs. the heirs and creditors on a bill filed for the sale of the property to pay the debts of the deceased owner, Mrs. M. L. Sanders, when the so-called United States tax sale was made?

Ans. 4. It was, and the suit had been pending long prior. The chancery court and the supreme court had both taken jurisdiction of the property, and ordered sales of the same, or parts of the same, to pay the debts of the decedent owner. I refer to the record itself as part of my deposition.

Int. 5. Where were you living when the so-called sale was made; and how long had you so resided there before and since the sale?

36 Ans. I was then living, as I am now, eighteen miles from the city of Memphis, in the county of Shelby, in the 10th civil district of Shelby County. I moved there from the city of Memphis on the 18th day of April, 1862, and have resided there continuously ever since.

Int. 6. What notice did you have, if any, of said sale before it took place?

Ans. 6. None whatever.

Int. 7. State where the Federal lines were, and what portion of Shelby County was in the occupation of the Federal military forces when the so-called sale took place in 1864.

Ans. The military lines were then and before and afterwards around the city of Memphis, only a mile or so from the corporate limits, and about two and a half miles from the bank of the river, in the centre of the city; above and below the city; the lines, in a sort of a circle, terminated at the river banks. The lines
37 did not vary but little, a half mile or so, during the war; only a small portion of Shelby County was then or before in the occupation of the Federal military forces; it included only the city of Memphis and a small circle around the city; outside was debatable ground, over which marched both Confederate and Federal troops. No part of my district was in the Federal occupation, and one or two between. There were 17 civil districts in this county, and my recollection is that not the whole of any one of the civil districts was in the entire military occupation of the Federal forces then or before that time. The city of Memphis is in parts only of the 5th, 13th, and 14th civil districts, converging at Memphis. The map of the county is referred to and made part of my deposition, marked "Map."

38 Int. 8. State whether the Federal authorities in Memphis were strict in regard to ingress and egress of the citizens of the county.

An. 8. These were strict, and at times very strict; had to go out only on military passes, and sometimes citizens could only get in on passes; the authorities were so strict, and the annoyance of getting out and the risk to run to travel abroad at the time were so great that the citizens would not venture inside the lines to Memphis, except in cases of the

greatest necessity. The gates and bars of the "Irving Block," a Federa military prison, had closed both before and since the so-called tax sale on many good citizens, and the terror of that prison kept many away, many of our citizens having died in that prison-house, as I was
39 then informed and believe.

Int. 9. Was any demand ever made of you for the so-called taxes?

Ans. Never.

Int. 10. Was the sale ever advertised in any newspaper?

Ans. None that I ever heard of.

Int. 11. Was any newspaper then published in Memphis?

Ans. The Bulletin was then published; had been regularly published before and during that year and since.

Int. 12. What did you do when you found that the sale had been made?

Ans. When I learned that the sale had been made, I came to Memphis and found that the tax commissioners had gone away to Nashville, and left no one behind to receive the taxes or permit redemption assessed against the property of $10.50. The property when sold was worth four or five thousand, $4,000 or $5,000.

40 Int. 13. Where did the other owners live in 1864?

Ans. In Texas.

X-interrogatories by defendant:

X-int. 1. Who gave the property in for assessment in the year 1860?

Ans. I do not know.

X-int. 2. Did you ever pay any taxes upon the property as described in the certificate of purchase to Thomas Keely?

Ans. I have paid taxes on the property described, but I do not think I ever paid taxes upon the property exactly described as it is in the certificate to Keely. I believe there are some receipts in the case of Story vs. myself in which the property is described, and they will show.

X-int. 3. Did you ever purchase the property at tax sale; if so, what description was the property sold under?

41 Ans. I purchased the property or a part of it, fronting on Market street or Carroll avenue, on behalf of my son Littleton, at tax collector's sale. My son Littleton has the certificate of purchases, or did have not a great while since.

X-int. 4. Did you ever make any other purchase of the property or any part of it tax sale; if so, when?

Ans. I do not think I ever did; if I did I have forgotten it.

X-int. 5. Did you or your son get a deed for the purchase you speak of in answer 3rd?

Ans. Never that I know of or remember.

X-int. 6. Did any else ever buy the property at tax sale for you or your benefit; if so, when, and who was it?

Ans. 6. Nobody ever bought it for my benefit. Tarlton R. Bell bought the property, and I bought of him and got a deed from him for it.

42 X-int. 7. Was the property ever described in the assessments as lots 19 and 3, or parts of lots 19 and 3?

Ans. I certainly did not know, but I think there was some such description as that when I purchased for my son; the certificate will show, and if I can get hold of it I am willing to file it with this deposition, as a part of it, or a copy of the same.

X-int. 8. You say, in answer to interrogatory 4 in chief, that you had

no notice of the sale before it took place; what papers were published in Memphis at that time, and did you or not see any of them?

Ans. I remember the Memphis Bulletin was published here, and I occasionally got a stray copy.

X-int. 9. Did you or not know that the property in Memphis
43 was generally advertised for sale by the Federal authorities in the spring of 1864?

Ans. I knew of it after the sale, but I do not recollect that I knew of before the sale.

X-int. 10. Were you in Memphis in June or July, 1864; if so, how often?

Ans. I think that I was in Memphis June or July, 1864.

X-int. 11. Did you learn of the sale of the property in controversy in June or July, 1864?

Ans. I do not know whether it was or not, but it was not long after the sale before I heard of it.

X-int. 12. Did you have any conversation with Thomas Keely in relation to the purchase of the lot; if so, when was it, or how long after the sale, and did he or not tell you in that conversation that you could redeem the property?

Ans. 12. I did have a conversation with Thomas Keely in rela-
44 tion to the purchase of the lot property; the time I do not recollect precisely; it may have been 2, 3, or 6 months; and he manifested a disposition to let me have the property in the way of a speculation.

X-int. 13. Did you offer to redeem the property from him or tender him his money for the purchase?

Ans. I never did to my recollection.

X-int. 14. Did you ever see the advertisement for the sale in the newspaper at any time before or after the sale?

Ans. I saw in some printed form, I think a newspaper, of the sales having been made; how long after the sale I do not know; it may have been during or shortly after the current terms of the sale, but whether it was a week or a month I can't recollect after the sale. I saw
45 that the property in controversy had been sold and was looking to the publication with a view of what property had been sold wherein I was interested.

X-int. 15. Did you get the paper in Memphis or at your home in the country?

Ans. I cannot say whether I got the paper in town or in the country.

X-int. 16. In the interview you had with Keely, after the sale, did he or not tell you that the commissioners were still in town, and that you could redeem the property?

Ans. I have no recollection of his telling that the commissioners were in town, and my impression is that he did not so state to me. And further deponent saith not.

WM M. PERKINS.

46 Sworn to & sub. before me this January 21st, 1874.

R. J. BLACK,
D. C. & M.

Deposition of Thomas Keely.—Filed April the 8th, 1875. E. A. Cole, C. & M.

Int'y by def'ts' att'y:

Int. 1. What is your age and residence?

Ans. I am about 43 years old; residence, Memphis, Tenn.

Int. 2. Are you interested in the property in controversy?

Ans. I purchased the property at the Federal tax sale in 1864; that is, M'r John Gunn purchased or bid off the property at the sale, and at his request I paid the money, and got the certificate annexed to my answer in the above-entitled cause.

Int. 3. Was the property advertised in a newspaper before the sale; if so, in what paper?

47 Ans. The property was advertised for sale in a newspaper published in Memphis, and I think it was the Bulletin, which was then published in Memphis.

Int. 4. Did you see and converse with W. M. Perkins in relation to the purchase of the property by you, after the sale? If so, state when it was and what was said in the conversation.

Ans. I did see M'r Perkins shortly after the sale. He came to my house and said something about the sale being unconstitutional, and he did not regard it as amounting to anything. I told him the commissioners were still in the city, and he could go and redeem the property if he wished to do so. He said it was an abolition concern, and as soon as the courts got organized here it would all be upset, or some-

48 thing to that effect. I told him I had purchased the property. He left me, I thought, in a bad humor.

Int. 5. Were you present at the sale, when the purchase was made by John Gunn?

Ans. 5. I was.

Int. 6. Where did the sale take place?

Ans. In the city of Memphis, on Second street, in what was called the Stillman Block, where the mayor's office was at that time, to the best of my recollection.

Int. 7. What time was it that the conversation occurred between you and Perkins?

Ans. It was a short time after the sale. I think about a couple of weeks.

Cross-examined by H. Clay King, sol. for compl'ts:

X-int. 1. How is it that the certificate of the United States commissioners shows that you were the purchaser at the tax sale, when

49 John Gunn was the real purchaser?

Ans. The land was bid in by Gunn, and he was the purchaser, and he turned over his purchase to me.

X-int. 2. What was the amount of the United States taxes on the land?

Ans. I do not know.

X-int. 3. What was the value of the land so purchased by John Gunn and yourself?

Ans. I think it was worth eight thousand or ten thousand dollars at the time of the sale.

X-int. 4. Who were present at the sale?

Ans. There was a crowd. Pat Sherrus was there, John Gunn was there, and others whose names I don't remember, although familiar.

X-int. 5. Was the war going on then?

Ans. The war was going on.

X-int. 6. Did you intend then to buy in and hold this property worth these thousands of dollars for the sum of $450\frac{00}{100}$, paid by you at the tax sale?

50 Ans. I told M'r Perkins I would not claim the property absolutely, but would make a fair adjustment with the true owner,

but I did not believe Perkins to be the true owner. I understood Perkins to say that he had once bought the property for Memphis City taxes. I intended to let the true owner redeem.

X-int. 7. Would you even be willing now to make a fair and reasonable adjustment of this matter with the true owners of the property and allow them to redeem, and will you so authorize and instruct your attorney, Judge George Dixon?

Ans. I will take $3,000 now and relinquish my tax claim.

X-int. 8. Will you not take less?

Ans. No, sir. Yes, I will take $2,500.00.

X-int. 9. Please file herewith the paper containing the advertisement of the tax sale.

X-ans. 9. I have not the paper and don't know where to get one.

51 Did try to get one and could not. Tried then. I think it was the Bulletin.

X-int. 10. Was it a supplement or extra to a newspaper, or was it the regular issue of a newspaper?

Ans. Can't say now; it may or may not be a supplement or extra. And further this deponent saith not.

THO'S KEELY.

Sworn to and sub. before me Ap'l 7, '75.

R. J. BLACK,
D. C. & M.

Final decree.—Ent. May 21, '75. M. B. 12, page 63.

On this 21st day May, 1875, this cause was finally heard before the honorable R. J. Morgan, chancellor presiding, on the bill, answer, exhibits, and depositions filed in the cause, and the court being

52 of the opinion that the complainants and the owners of the property mentioned in the pleadings are entitled to the relief sought by the bill, it is now ordered and decreed that the claim to said property by the defendant Keely, under his certificate from the United States commissioners, showing a United States tax title to said property under the acts of Congress for the sale of property for direct taxes in the insurrectionary States is not valid, but that the same is a cloud on the title of complainants and the defendant W'm M. Perkins, the same is now ordered and decreed to be surrendered and cancelled, and the complainants and the said Perkins are now quieted in the possession of their property. The costs of this suit will be paid by the defendant Keely, for which execution may issue.

53 From which decree the defendant Keely prays an appeal to the supreme court of the State of Tennessee for the western division thereof, which is hereby granted on the condition that said defendant execute an appeal bond with approved security in the master's office of this court in thirty days from this day.

Enter this.

H. CLAY KING,
For Complainants and Perkins.
GEO. DIXON,
For Keely.

Appeal bond.—Filed 5th day of June, 1875. E. A. Cole, C. & M.

We, Thomas Keely and John Gunn, acknowledge ourselves indebted to X. B. Sanders in the sum of two hundred and fifty dollars. To be void if the said Thomas Keely, who has prayed for and
54 obtained an appeal from a decree of the first chancery court of Shelby County, in a cause in which X. B. Sanders et al. are complainants and Thomas Keely et al. are defendants, to the next term of the supreme court of Tennessee, for the district of West Tennessee, to be held at Jackson, commencing the second Monday in September, 1875, shall pay all such costs as shall be awarded against him by the said supreme court. This 4th day of June, 1875.

THO'S KEELY. [SEAL.]
JOHN GUNN. [SEAL.]

Decree of supreme court.

And on Thursday, the 28th day of October, 1875, the same
55 being one of the days of the September term of the supreme court of Tennessee, the following decree was entered in this cause by said court, to wit:

THURSDAY, *October 28th*, 1875.

XENOPHON B. SANDERS, CALVIN L. STORY, & Eliza Margaret Story, his wife, *v.* THOMAS KEELY & W'M M. PERKINS. } ✕ 407. Shelby ch'y docket.

This cause was this day heard on the transcript of the record of the first chancery court of Shelby County, and the appeal of the defendant Thomas Keely from the decree of the court below, and it appearing to the court that the title to the property in controversy relied upon by the defendant Thomas Keely is based upon a purchase made of the direct tax commissioners of the United States at a sale made by them
56 at Memphis, in June, 1864, under and by virtue of the act of Congress entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes,' and the act amendatory of the same, and that the said sale was and is unlawful and void, and passed no title to the said Thomas Keely; and it further appearing that the complainants and the defendant W'm M. Perkins were lawfully seized and possessed of the said property at the time of the said sale, and that they have not since parted with their title, and that they are now lawfully entitled thereto, and that the certificate of purchase held by the said Thomas Keely is a cloud upon their title, it is therefore ordered, adjudged, and decreed that the decree of the court below appealed from be, and the same is hereby,
57 affirmed, and the said Thomas Keely is ordered and decreed to surrender the said certificate of purchase, and the same is hereby cancelled, and the complainants and the said Perkins are now hereby quieted and confirmed in the possession of the property aforesaid, more particularly described in the pleadings. And the defendant Thomas Keely, and John Gunn, his surety on appeal bond, will pay the costs of this cause in this court and the court below, for which execution may issue.

Writ of error.—Bond.

Supreme Court of the United States.

XENOPHON B. SANDERS, CALVIN L. STORY, and ELIZA MARGARET STORY, citizens of the
58 State of Texas,
vs.
THOMAS KEELY AND WILLIAM M. PERKINS, citizens of Shelby County, Tennessee.

Know all men by these presents that we, Thomas Keely and John Gunn, are held and firmly bound unto Xenophon B. Sanders, Calvin L. Story, Eliza Margaret Story, and William M. Perkins in the sum of one thousand dollars, to be paid to the said Xenophon B. Sanders, Calvin L. Story, Eliza Margaret Story, and William M. Perkins, their executors or administrators; to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents. Sealed with our seals. Dated this 30th day of October, 1875.

59 Whereas the above-named Thomas Keely has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Tennessee, sitting at Jackson for the western division of the State of Tennessee:

Now, therefore, the condition of this obligation is such that if the above-named Thomas Keely shall prosecute their said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

THO'S KEELY. [SEAL.]
JOHN GUNN.

Sealed and delivered in presence of—
G. A. JUNKERMAN.
T. F. MEATH.

I am the owner of one lot, on the corner of 3rd & Saffrans st's,
60 worth one thousand dollars, subject to execution, after payment of all just debts.

JOHN GUNN.

Subscribed and sworn to before me this 30th of Oct., 1875.
JAMES REILLY, *Clerk.*

STATE OF TENNESSEE,
Shelby County:

Personally appeared before me, James Reilly, clerk of the county court of said county, John Gunn and Thomas Keely, the within-named bargainers, with whom I am personally acquainted, and who acknowledged that they executed the within instrument for the purposes therein contained.

Witness my hand at office this 30th day of October, A. D. 1875.
[SEAL.] JAMES REILLY, *Clerk.*

61 The foregoing bond is this day examined and approved by me, this 3rd November, 1875.

A. O. P. NICHOLSON,
Chief Justice of the Supreme Court of Tennessee.

(Endorsed:) Filed November 3rd, 1875. Jno. H. Freeman, cl'k.

Writ of error.

UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of the supreme court of the State of Tennessee, sitting at Jackson for the western division of the State of Tennessee, greeting:

Because in the record and proceedings, and also in the rendition of the judgment or decree of a plea which is in the said supreme
62 court of the State of Tennessee, sitting at Jackson for the western division of the State of Tennessee, before you, being the highest court of law or equity of the said State, in which a decision could be had in the said suit between Xenophon B. Sanders, Calvin L. Story, and Eliza Margaret Story, citizens of the State of Texas, complainants, and Thomas Keely and William M. Perkins, citizens of Shelby County, Tennessee, defendants, a manifest error hath happened to the great damage of the said Thomas Keely, as by his complaint appears, we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the
63 United States, together with this writ, so that you may have the same at Washington on the second Monday of October, 1876, to be then and there held, that the record of proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court the third day of November, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.] HORACE E. ANDREWS,
Clerk Circuit Court U. S. Dist. West. Tenn.

64 Examined and allowed November 3rd, 1875.

A. O. P. NICHOLSON,
Chief Justice of the Supreme Court of Tennessee.

(Endorsed:) Filed Nov. 3rd, 1875. Jno. H. Freeman, cl'k.

THE STATE OF TENNESSEE:

I, John H. Freeman, clerk of the supreme court for the western division of said State at Jackson, do hereby certify that the above and foregoing comprises a full, true, and perfect transcript of the record and proceedings had in a certain cause lately determined by said court wherein X. B. Sanders et al. were complainants, and Thomas Keely et al. defendants, the same appearing of record in my office.

In testimony whereof I have hereunto set my hand and affixed
65 the seal of said court at office, in the city of Jackson, this the 15th day of March, A. D. 1876, and of the Independence of the United States the 100th year.

[SEAL.] JOHN H. FREEMAN, *Clerk*,
By S. D. HAYS, *D. C.*

66 UNITED STATES OF AMERICA, *ss:*

To Xenophin B. Sanders, Calvin L. Story, and Eliza Margaret Story, of the State of Texas, and William M. Perkins, of Shelby County, Tennessee.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, 1876, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Tennessee, sitting at Jackson for the western division of the State of Tennessee, wherein Thomas Keely is plaintiff and Xenophin B. Sanders, Calvin L. Story, Eliza Margaret Story, of the State of Texas, and William M. Perkins, of Shelby County, Tennessee, are defendants in error, to show cause, if any there be, why the judgment or decree in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

67 Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this third day of November, in the year of our Lord one thousand eight hundred and seventy-five.

A. O. P. NICHOLSON,
Chief Justice of the Supreme Court of Tennessee.

I acknowledge the receipt of a copy of this citation this day of November, 1875.

68 STATE OF TENNESSEE,
Madison County:

William M. Randolph makes oath that on the 4th day of November, 1875, and within ten days from the rendition of the judgment mentioned in the foregoing citation and the writ of error therein mentioned, he lodged a copy of the said writ of error and of the said citation for the above-named defendants in error in the office of the clerk of the supreme court of the State of Tennessee, for the western division at Jackson, in the said State, together with the writ of error and the supersedeas bond required by law, approved by the chief justice of the supreme court of Tennessee.

And, also, that on the 5th day of November, 1875, he served the foregoing citation on H. Clay King, solicitor of record for the said defendants in error, as he is informed and believes, by handing him a
69 true copy thereof.

W. M. RANDOLPH.

Subscribed and sworn to this 5th day of November, 1875, before me.

JNO. H. FREEMAN,
Clk Supreme Court of Tennessee.

(Indorsed:) Supreme Court of the United States, 1875, Octo. term. No. 953. Thomas Keely vs. X. B. Sanders and others. Citation and service. Filed 16 May, 1876. Randolph, Hammond, & Jordan.

(Indorsement on cover:) No. 108. Thomas Keely, plaintiff in error, vs. Xenophon B. Sanders, Calvin L. Story, and Eliza Margaret Story. Tennessee sup. court. Filed 15th April, 1876.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1878.

NO. 108.

THOMAS KEELY, PLAINTIFF IN ERROR,

v.

XENOPHON B. SANDERS, CALVIN L. STORY, ELIZA MARGERET STORY, AND WILLIAM M. PERKINS, DEFENDANTS IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

BRIEF OF WM. M. RANDOLPH, OF COUNSEL FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1878.

NO. 108.

THOMAS KEELY, PLAINTIFF IN ERROR,

v.

XENOPHON B. SANDERS, CALVIN L. STORY, ELIZA MARGERET STORY, AND WILLIAM M. PERKINS, DEFENDANTS IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

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BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

THE facts necessary to be noticed are substantially as follows:

On the 24th of June, 1864, Keely bought the land in controversy at a sale by the U. S. Direct Tax Commissioners, held at Memphis, under the Acts of Congress for the collection of direct taxes in the insurrectionary districts for unpaid direct taxes levied for the year 1861, and paid the purchase price, and took from the Commissioners a certificate of purchase. His title depends upon the validity of that sale. The adverse parties, one of them a defendant to and the others the plaintiffs in the bill, claim title as the owners of the land prior to such sale for taxes, and insist that such sale is void, and pray it be so declared, and that the cloud upon their title caused by Keely's claim be removed, and that the same be surrendered up and canceled, and Keely be perpetually enjoined from the assertion of any right under it.

The bill attacked the title derived by Keely under the sale for taxes on certain specified grounds. Those grounds, and the facts in the record having reference to them, will now be stated in order.

1. The property had been taken into the custody of the State Court of Chancery, in a suit pending therein involving it, before the taxes accrued, or the sale for taxes, and hence the sale could not lawfully be made. The Chancery Court would have ordered the payment of the taxes if they had been presented as they should have been, and as the other taxes had been. The answer denies the state of facts insisted on in the bill, in reference to the suit, and there is no proof to overcome it, unless the deposition of Perkins does so. Perkins undertakes to prove by parol the pendency of the suit, and the proceedings had in it, about as stated in the bill.

Record, pp. 2, 7 and 9.

2. The property was misdescribed in the publication, order of sale, and sale, in this, that it was described as country lot 506, when it was known as lots numbers 19 and 3.

Record, p. 3.

The answer says the lot Keely purchased was two (2) acres, and was known on the map of Memphis as lot 506, and was assessed in the state assessor's book for the year 1860 as lot number 506, as called for in his certificate of purchase. The proof as to description is in the deposition of Perkins, who says the property was a fractional part of country lot 506, and, by the division of the country lot into city lots before the war, came to be known as lots 19 and 3, and perhaps was afterward further subdivided into eight or nine lots. He further says he paid taxes on the property described, but did not think he ever paid taxes upon it *exactly* described as it is in the certificate to Keely. He believed there were some receipts for taxes in which the property was described, and they would show. He did not know that

the property was ever described in the assessments as lots 19 and 3, or parts of lots 19 and 3, but he thought there was some such description as that when he purchased the property, or a part of it, fronting on Market Street or Carroll Avenue, on behalf of his son, Littleton, at a tax collector's sale; and his son had the certificate of purchase, and it would show; and if he could get hold of it he was willing to file it, or a copy, as a part of his deposition.

Record, pp. 7, 8, 9 and 10.

3. No legal or proper notice of the sale of lots 19 and 3 was ever made or given, by advertisement or otherwise.

The answer states that legal notice *was* given of the sale. Perkins proves he never knew of the sale before it occurred; that he lived outside the city, in Shelby county, about eighteen miles, and outside the Federal military lines, which could be passed only on a military pass, which sometimes could not be obtained at all, and at all times required citizens to submit to great annoyance. And further, that before and after the tax sale, "so-called," many good citizens had been imprisoned in the Irving Block, a Federal military prison, and the terror of that prison kept many citizens away—many having died in that prison-house—as he was then informed, and believed.

He never heard, before the sale, of any advertisement of the sale of the property in a newspaper, though he knew, *after* the sale, that the property in Memphis was generally advertised for sale, by the Federal authorities, in the spring of 1864, and saw a newspaper containg the advertisement of sale. He was in Memphis in June or July, 1864, and learned of the sale of the property not long after the sale took place.

Keely proves the property was advertised for sale, before his purchase, in a newspaper published in Memphis, called the *Bulletin*.

Record, pp. 3, 7, 9–11, 12, 13.

4. The taxes pretended to be due the United States were only $10.50, and the whole property was sold for $450.00, when, the property being susceptible of any number of sub-divisions, it was the duty of the Commissioners to sell only so much as was necessary to pay the taxes. No attempt was made to sub-divide the property, and in fraud of the rights of the owners, the whole property worth between $50,000 and $100,000 was fraudulently sold for $450. The answer denies the fraud charged, and the conclusions as to the duties of the Commissioners under the law. There is no proof in the record of the amount of the taxes due, unless Perkins' incidental statements prove it, nor of the fact that the property was capable of subdivision, nor of any fraud of any kind. The answer states that $25,000 or $30,000 would be a liberal price or value upon the property. Perkins proves the property, at the time of the sale for taxes, was worth $4,000 or $5,000. And Keely says it was worth at that time $8,000 or $10,000.

Record, pp. 3, 7, 10 and 12.

5. The plaintiffs were always ready, as the bill alleges, and willing to pay all taxes due on the property, and the direct taxes due the United States would have been paid, if they had had any notice whatever, which they did not have of the existence of the same. They resided, at the time of the sale for taxes, in the State of Texas, and had been living there for a number of years, and neither had, nor could have, any notice of the taxes or the sale. The privilege of paying the taxes before sale, and of redeeming from the sale, was taken away by the absence of Perkins from Memphis, and his inability to get a pass to come there to pay the taxes; and, after the sale, on the first opportunity, he came to the city with the money, to redeem, within the time allowed by law to redeem, and found the Commissioners who made the sale all absent from the city with all their books and papers, probably at Nashville, and no agent or officer left to receive the redemption money; and there was no safe communication by travel or otherwise to Nashville, or anywhere else outside the limits of the city of Memphis, owing to flagrant civil war.

This sale and all others made in the year 1864, in Memphis, were not fair and *bona fide;* were not made with the simple purpose of securing and collecting the taxes due the government; but were made with the design to oppress and deprive the owners of their property, unfairly and unlawfully.

The answer denies the statement of facts contained in the bill, and requires proof. Perkins fails to prove he could not come to Memphis to pay the taxes and redeem the property. His statement is that when he learned the sale had been made he came to Memphis and found the Tax Commissioners had gone away to Nashville, and left no one behind to receive the taxes, or permit redemption. He had a conversation with Keely in relation to the purchase of the lot, two, three or six months after the sale, and Keely manifested a disposition to let him have the property in the way of a speculation, but he did not offer to redeem the property.

Keely says he saw Perkins shortly after the sale, he thinks about a couple of weeks. He came to his house and said something about the sale being unconstitutional, and he did not regard it as amounting to anything. Keely told him the Commissioners were still in the city and he could go and redeem the property if he wished to do so. Perkins said it was an "abolition concern," and as soon as the Courts got organized here, it would be all upset, or something to that effect, and left Keely, as he thought, in bad humor. Keely says he intended to let the true owner redeem. And he was willing, when he gave his deposition, to take $2,500 and allow redemption.

Record, pp. 3, 7, 10, 11, 12 and 13.

6. When the sale was made the military authority of the United States was not established in and over the county of Shelby, state of Tennessee, nor was it established in any one county, as required by law. The answer denies the fact as stated in the bill. Perkins proves the military lines of the Federal army were only a mile or two from the corporate limits of the city of Memphis. Outside these lines was debatable ground, over which both Confederate and Federal

troops marched. No part of the civil district of Shelby county Perkins lived in was in Federal military occupation. There were seventeen civil districts in the county, and Perkins' recollection was that not the whole of any one civil district was in the entire military occupation of the Federal forces, then or before that time. Memphis is in parts of the 5th, 14th and 15th civil districts of Shelby county. Perkins makes the map of the city a part of his deposition.

Record, pp. 3, 7 and 9.

If the court will consider the general orders of the War Department, and the officers commanding in the field, and the facts as they existed, as evidenced by the public history of the times, the truth will appear to be that the prescribed military lines of the Federal army extended over the whole of West Tennessee. There was no difficulty in that army marching where it chose within the district, without serious molestation. If Confederate forces came in, it was only temporarily as raiding parties. There was no permanent occupation by them of any post or district within the designated Federal lines. If any armed Confederate forces were to be usually found within those lines they were rather to be regarded as guerrillas than regular forces. At the same time the sympathies of the people being with the Confederates, both they and the Federals felt and acted as if the Confederates actually possessed and controlled the whole country, except where a Federal armed force was present.

7. The Acts of Congress under which the sale to Keely by the Tax Commissioners was made are unconstitutional, null and void.

Record, p. 3.

8. The assessment of taxes made under the said acts on property in Tennessee, and the plaintiff's property in particular, are partial, excessive, erroneous, irregular, oppressive and void. Just in what particulars the assessment is obnoxious to these objections, neither the bill nor the evidence points out.

Record, p. 4.

The Court of Chancery, where the cause was first tried, decreed that the claim of Keely, under his certificate from the United States Direct Tax Commissioners, showing a United States tax title to the property under the acts of Congress for the sale of property for direct taxes in the insurrectionary states, was not valid, but was a cloud upon the title of the plaintiffs and the defendant Perkins, and that it should be surrendered and canceled, and the plaintiffs and Perkins be quieted in the possession of their property.

Record, p. 13.

From this decree Keely appealed to the Supreme Court of the state, and on the hearing in that court, it appearing that the title to the property relied on by Keely was based upon a purchase made of the Direct Tax Commissioners of the United States, at a sale made by

them at Memphis in June, 1864, under the act of Congress entitled, etc., and the acts amendatory thereof, and that such sale vas void, and passed no title to Keely, and that the plaintiffs and the defendant Perkins were lawfully possessed of the property at the time of the sale, and had not since parted with their title, and were then lawfully entitled thereto, and that the certificate of purchase held by Keely was a cloud upon their title, it was decreed that the decree of the Chancery Court, appealed from, be affirmed, that Keely surrender his certificate of purchase, which was thereby canceled, and the plaintiffs and Perkins were quieted and confirmed in the possession of the property.

Record, p. 14.

The present writ of error has been sued out by Keely to reverse the decree.

ASSIGNMENT OF ERRORS.

The plaintiff in error assigns for error:

1. The court below erred in decreeing the sale by the Direct Tax Commissioners, at which Keely purchased, was void, and passed no title to him, and in decreeing the certificate of purchase held by him was a cloud upon the title of the plaintiffs in the bill and Perkins, and in canceling such certificate.

2. The court erred in quieting and confirming the possession by the plaintiffs in the bill and Perkins of the property in controversy.

Before proceeding to notice the questions arising, I will give a synopsis of the material portions of the acts of Congress under which the sale was made.

The act of 5th August, 1861, 12th Statutes at Large, 294, laid a direct tax of twenty millions, annually, upon the United States, and apportioned the same among the states. In section 52 of the act it was declared that if the people of any of the states were in actual rebellion against the authority of the government of the United States at the time the act went into operation, so that the laws of the United States could not be executed therein, it should be the duty of the President, and he was authorized to proceed to execute all the provisions of the act within the limits of such state as soon as the authority of the United States therein was re-established, and to collect the sums which would have been due from the persons residing or holding property therein, with the interest due at six per centum per annum thereon until paid, in the manner and under the regulations prescribed in the act.

The act of June 7, 1862, 12th Statutes at large, 422, regulated more particularly the collection of the direct taxes in the states in rebellion.

The first section provided for the apportionment and charge of the

tax upon all the lands and lots of ground situate in any state in rebellion, except such as were exempt from taxation, "as the said lands or lots of ground were enumerated and valued under the last assessment and valuation thereof made under the authority of said state previous to the first day of January, 1861; and each and every parcel of the said lands, according to the said valuation, is hereby declared to be, by virtue of this act, charged with the payment of so much of the whole tax laid and apportioned by said act upon the state wherein the same is situate, as shall bear the same direct proportion to the whole amount of the direct tax apportioned to said state as the value of the said parcels of land shall respectively bear to the whole valuation of the real estate in said state, according to the said assessment and valuation made under the authority of the same; and in addition thereto a penalty of fifty per centum of said tax shall be charged thereon.

By section 13, in case the records of the assessments and valuation of the lots of land were not to be had, the commissioners were authorized to take evidence of the same and to value and assess the same in their own judgment upon such evidence as might appear before them; "and no mistake in the valuation of the same, or in the amount of tax thereon, should in any manner whatever affect the validity of the sale of the same, or of any of the proceedings preliminary thereto."

The President was to declare what States were in rebellion, and thereupon the lots and lands were to become charged, respectively, with their respective portions of the said direct tax, and the same and the penalty should be a lien thereon without any further proceeding.

The President was authorized to appoint a board of three Tax Commissioners for each state in insurrection who should enter upon the discharge of the duties of their office, "whenever the Commanding General of the forces of the United States entering into any such insurrectionary state or district should have established the military authority of the United States, throughout any parish, or district, or county of the same; and they should open one or more offices for the transaction of business."

The owners of the lots or parcels of land were given sixty days after the Tax Commissioners had fixed the amounts due on them, respectively, within which to pay the taxes charged thereon; and if the taxes were not paid within the said time "the title of, in, and to each and every piece or parcel of land upon which the said tax had not been so paid, should thereupon become forfeited to the United States, and upon the sale thereinafter provided for, should vest in the United States, or in the purchasers at such sale, in fee simple, free and discharged from all prior liens, incumbrances, right, title and claim whatsoever."

If the taxes were not paid as required the Commissioners were to cause the same to be advertised for sale in a newspaper published in the town, parish, district, or county where situate, or in some other newspaper, for at least four weeks, and by posting notices of the sale in three public places in the town, etc., within which the lands were situate, at least four weeks previous to the day of sale; and at the time

and place of sale, to cause the same to be severally sold to the highest bidder for a sum not less than the taxes, penalty and costs, and ten per centum per annum interest on said tax, pursuant to said notice. In all cases where the owner of the ground did not appear in person before the Board of Commissioners and pay the amount of the said tax, with ten per cent per annum interest thereon, with the cost of advertising the same, or request the same to be struck off to a purchaser for a less sum than two-thirds of the assessed value of said several lots or parcels of ground, the Commissioners were authorized at the sale to bid off the same for the United States, at a sum not exceeding two-thirds of the assessed value thereof, unless some person should bid a larger sum; and in that case the same should be struck off to the highest bidder, who should, upon paying the purchase money, be entitled to receive from said Commissioners their certificate of sale, which said certificate should be received in all courts and places as *prima facie* evidence of the regularity and validity of said sale, and of the title of the said purchaser or purchasers under the same. Sixty days were given after the sale for redemption, and two years in the case of minors and others under disability, and the same length of time, upon certain prescribed conditions, to persons who had taken no part in the insurrection against the government. The President was given authority to select any tracts, parcels or lots of land for government use, and the Commissioners were authorized to bid off the same in the name of the United States.

The final proviso to section seven (7) of the Act is in these words: "*And provided further*, that the certificate of said Commissioners shall only be affected as evidence of the regularity and validity of sale by establishing the fact that said property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed according to the provisions of this Act."

The Commissioners, by section 14 of the Act, were required to make a record of the quota or amount of said direct tax assessed on each tract or parcel of land, which said amounts should be distinctly stated in the advertisement or notice of sale, together with a description of the land to be sold, and an entry should be made in the book or books of each tract sold, together with the name of the purchaser, and the sum for which the same was sold; and a transcript or transcripts from the said book or books duly verified by the Commissioners, and the books themselves, when the Commissioners were out of office, were to be filed in the office of the Secretary of the Treasury of the United States, and said books and transcripts, and copies of the same duly certified by the Secretary of the Treasury, were to be evidence in any court in the United States.

The proceeds of the sales were to be paid into the Treasury of the United States, to be disposed of as prscribed in the twelfth section.

I will follow the objections to the sale under which Keely claims, in the order in which they are stated above:—

I.

The property was in the custody of the State Court of Chancery, and therefore not subject to be sold by the United States for direct

taxes. It is doubtful whether the parol testimony of Perkins, the only evidence as to the fact, ought to be considered competent to prove it, as it clearly is a matter of record.

But assuming the fact to be so, it appears to me the law is not with the plaintiffs in the bill. It is not necessary to consider the question whether, ordinarily, a sale for taxes passes the title to property a court has possession of, where the taxes are levied, and the court sits under the authority of the same government.

Even that question ought not to be difficult, when presented in a case involving a title acquired at a sale for taxes, made according to the forms of the law. This case, however, is different. The taxes here were levied by the government of the United States, and the court having the property in custody was a State court. In such a case, I take it, this court needs neither argument nor authority for the position that the sale was authorized.

II.

The description by which the lot was sold, is objected to.

There is no dispute about the identity of the ground sold. It was two acres, on Market street and Thornton Avenue, part of country lot 506, 5th Civil District, Shelby county, designated on the published map of Memphis, assessed in 1860 to Sanders and Perkins. It is claimed it was not described as lots 19 and 3, part of country lot 506. But it is not denied the description was a true one, and was ample to identify the property; nor that the description is the same as that contained in the State assessment for 1860; nor is it asserted that the additional description lots, "19 and 3", would have added anything to the certainty of the description.

Nothing in the description could have misled the owners, and it certainly contained the three requisites, as stated by Judge Cooley: 1. It informed the owners of the claim made on their property; 2. It informed the public what land was taxed and was offered for sale; and 3. It enabled the purchaser to obtain a sufficient conveyance.

"If the description is sufficient for the first purpose," Judge Cooley says, "it will ordinarily be sufficient for the others also."

Cooley on Taxation, page 284.

The court below evidently treated the description as sufficient, and did not at all base its decree upon the idea that there had been an insufficient description.

Besides, it may be Congress intended to dispense with an independent, accurate description in the assessment by the Direct Tax Commissioners, since it required them to adopt the last assessment made by State authority previous to 1st January, 1861, in making their assessment, and levied the tax upon the property according to such assessment. See sections 1 and 13 of the Act of 7th June, 1862. If the Commissioners did adopt such State assessment, which in the absence of proof to the contrary, they must be presumed to have done, was not their description, by the very terms of the act of Congress, sufficient?

And is not the only question open for inquiry, this, to-wit: whether the Commissioners did in fact adopt the description in the State assessment next prior to 1st January, 1861?

III.

It is objected that the property was not advertised for sale, legally or properly, so as to give proper notice.

The plaintiffs in the bill fail to prove *no* notice was given, or that the notice was defective, while Keely fails affirmatively to prove such a notice as the statute prescribes.

I contend the question whether a notice of the sale was given, is one not open to inquiry. The statute under which the sale was made precludes any such defense. Section 7 of the act of 7th June 1862, as we have already seen, contains this proviso: "That the certificate of said Commissioners shall only be affected as evidence of the regularity and validity of the sale, by establishing the fact that said property was not subject to taxes, or that the taxes had been paid, previous to sale, or that the property had been redeemed according to the provisions of this act."

It was evidently the intention of Congress to confine the objections to the validity of the sale to the three named. Words could have expressed that intention no more clearly. If the taxes were in fact unpaid when the sale was made, there could be no antecedent fact of importance in invalidating the sale, except that the land was *not* subject to the tax. And the only subsequent fact that could be shown to impeach the title of the purchaser, was that the land had been redeemed *after* the sale, as provided in the act.

The power of Congress to pass a law prescribing the grounds on which the title of the purchaser at a sale for taxes levied by the United States may be attacked, and, cutting off all other grounds of attack, can hardly be doubted—at least I shall assume it to be beyond doubt.

Blackwell on Tax Titles, *p. 79, and cases.

Assuming the power to make the law, its construction, or rather interpretation, is not difficult.

It will be noticed it is first declared in section seven (7) of the act of 7th June, 1862, that the certificate of sale of the Direct Tax Commissioners "should be received in all courts and places as *prima facie* evidence of the regularity and validity of said sale, and of the title of the said purchaser or purchasers under the same." I understand this to make the certificate *prima facie* evidence of the existence of every fact, no matter of what nature, necessary to make the sale regular and valid, and to give the purchaser title under it. In other words, the purchaser shows himself entitled to the land by the bare production of the certificate of sale, without any proof whatever in addition to it.

But Congress did not stop with making a *prima facie* case for the purchaser who produced his certificate of sale from the Direct Tax

Commissioners. In the proviso to the same section it enacted further, as already shown, that the certificate "shall only be affected as evidence of the regularity and validity of sale by establishing the fact that said property was not subject to taxes, or that the taxes had been paid previous to the sale, or that the property had been redeemed according to the provisions of the act."

These two enactments, taken together, make the certificate of sale by the Commissioners conclusive proof of every fact essential to the regularity and validity of the sale and the title of the purchaser under it, except the three facts mentioned in the provisio, just copied, and as to those three facts the certificate is *prima facie* evidence.

The Supreme Court of Tennessee, it appears from its opinion in *McKinley v. Sherry*, elsewhere referred to, would have yielded to this interpretation, if the facts had all been recited in the certificate of sale of the Commissioners. As elsewhere remarked, the act of Congress did not prescribe the form of the certificate of sale, nor require it should contain any recital whatever, and it is probably not within the province of the courts, at this late day, at least, to declare what should have been its exact form.

Besides the recitals in the certificate of sale, however specific, in the absence of an express statute making them so, would not have been evidence against the former owners of the lot.

Blackwell on Tax Titles, *p 73–74, and *p. 513.

The certificate, therefore, derives its effect as evidence not from its form or what it contains, but from the statute declaring it shall be evidence. And the recitals in it, had it contained recitals, would have been evidence only because, and to the extent, that the statute made them evidence.

As the whole virtue is in the statute it was as competent for Congress to put the statute in such form as to make the simple certificate of sale, without recitals, evidence, as it would have been for it to have made a statute declaring the certificate containing a recital of all the facts it pre-supposed such evidence.

The only question, therefore, is what *did* Congress do? And the reading of the statute conclusively establishes that it made the certificate of sale—that is a certificate of the single fact that the Commissioners at a certain time and place had sold the property to the purchaser—the evidence of the facts necessary to the regularity and validity of the sale and the title of the purchaser under it. It prescribed no recitals, it required no form, it took no distinction between one form and another. The certificate of sale was to be evidence, not only in *one* case, but in *every* case of a sale by the Commissioners, and evidence to the very *same extent* in every case. Nothing was left to their discretion or want of discretion, permitting them to discriminate between different purchasers, putting one on the favorable grounds contemplated by the statute, and subjecting another to the almost impossible burden of proving, by extrinsic affirmative evidence, each and all the facts necessary to the regularity and validity of the sale, and his title under it.

The act of 7th of June, 1862, may now, as times have changed, at first appear to be harsh but when considered in the light of the circum-

stances under which it was passed, which are alluded to by Miller, Justice, in *Turner v. Smith*, 14 Wallace, 553, it will not be deemed unjust or unnecessary.

And the principles applicable to legislation for insuring the prompt and efficient collection of the public revenue, to be deduced from established precedents will be found fully to authorize the most stringent of its provisions.

Murray's Lessee v. The Hoboken Land and Improvement Company, 18 Howard 272, is an instructive case on this branch of the law. There it was decided not only that the Solicitor of the Treasury might lawfully issue a distress warrant under the act of 15 May, 1820 (3 Statutes at Large, p. 592), and that a sale under such warrant was sufficient to pass title, but also that the recitals in the warrant were evidence of the facts recited.

18 Howard, p. 285.

In an elaborate opinion, Emmons, Circuit Judge, in *Pullan v. Kinsinger*, 2 Abbott's U. S. Repts., p. 94, sustained entirely the provision in the act of Congress which forbids any suit in any court to restrain the assessment or collection of any tax levied under the authority of the United States.

Upon examining the statutes of the several states having reference to the effect of deeds or conveyances by collectors under sales for unpaid taxes, as evidence in support of the title of the purchasers, it will be found they vary. Some declare simply that the deed or conveyance shall be evidence, or *prima facie* evidence of the facts necessary to show the validity of the sale, or of certain of those facts, while others make the the deed or conveyance evidence of such facts only as are recited in it.

In Arkansas, for instance, where the collector's deed recites all the facts, an auditor's deed is not required to contain any recital. It is evidence of the regularity of *all* the proceedings of the collector and auditor, though none of them are recited.

Steadman v. Planters' Bank, 2 English, 424; *Bettison v. Budd*, 17 Ark., 566; and see *Thomas v. Lawson*, 21 Howard, 332.

The collector's deed in Illinois appears not to contain particular recitals, and so of the deed of the auditor.

Blackwell on Tax Titles, *p. 197, and *p. 369, note 1.

The case of *Allen v. Armstrong*, 16 Iowa R., p. 508, is upon a statute having provisions something similar to those of the act of Congress here in question, and, as I think, is authority for some of the positions here taken.

And see, as having some application to the questions in this case:

Vance v. Schuyler, 1 Gilman (Ill.), 160; *Messenger v. Germain*, 1 Gilman, 631; *Rhinehart v. Schuyler*, 2 Gilman, 473; *Gwynne v. Neiswanger*, 18 Ohio, 400; *Henderson v. Sterrett*, 4 Sneed, 470; *Tharp v. Hart*, 2 Sneed, 569; *Pillow v. Roberts*, 13 Howard, 472; *Thomas v. Lawson*, 21 Howard, 331.

But the case of *Sharpleigh v. Surdam*, an opinion by the late Judge Emmons, a copy of which is furnished with this brief, and which may be found reported in 11 Western Jurist (for year 1877), p. 203, is exactly similar to this case, involving a sale made by the same commissioners, and at the same time and place as the sale here in question.

While I do not suppose the Court will regard it as binding authority, I am sure it will give such weight to the opinion as the great learning of the eminent Judge and the cogency of his reasoning authorize.

IV.

The fourth objection to the validity of the sale is in substance that while the taxes due were only $10.50, and the property was worth $50,000·00 or $100,000.00, and was susceptible of any number of subdivisions, the Direct Tax Commissioners, in fraud of the rights of the owners, sold the whole lot, without sub-division, for $450.00.

Assuming the facts to be as stated in the bill—which, as has been shown, cannot truthfully be done—the objection is without force. The act of Congress required the sale of the lot as assessed—*the whole lot. Turner v. Smith*, 14 Wallace, 553. It did not authorize any sub-division nor the sale of only a part. The whole lot was to be sold to the highest bidder at public auction for a sum not less than the taxes, penalty and costs, and ten per centum per annum interest on the tax and the entire proceeds of the sale were to be paid into the treasury. Congress intended the title to the lot should upon the sale vest in the purchaser, subject to the right of redemption as prescribed in the act, and after the sale, that the proceeds of the sale should stand in the place of the lot, and that the rights of the Government and the former owner, whatever they were, should attach to those proceeds instead of the lot itself. Of the power of Congress so to legislate, there can be no reasonable doubt. If the Commissioners followed the law, what they *did* could not possibly be a fraud on the owners.

Blackwell on Tax Titles, *p. 286, and see *Turner v. Smith*, 14 Wallace, 553.

V.

The fifth point of objection is the owners had no notice that the taxes were due, nor of the sale, and by reason of residing in Texas, and their inability to come to the city of Memphis, though ready to pay the taxes and to redeem after the sale, if they had been informed of those facts, they were prevented doing so. In this connection, the charge in the bill is that the sale was not fair or *bona fide*—was not made with the simple purpose of securing and collecting the taxes due the Government, but with the design to oppress and deprive the owners of their property unfairly and unlawfully, and, therefore, was void.

The law charged the owners with notice both of the assessment of the tax, and, if the statute was followed, which, as has been shown, we are now conclusively to presume, of the sale for its non-payment also, and no actual notice of any sort of either of those facts was necessary.

State Railroad Tax Cases, 92 U. S. (2 Otto), 575, 609.

The facts that the owners resided in Texas, or were not able to get into Memphis, and could not communicate with Memphis, and therefore, could not have knowledge of what was transpiring there, are not material in any possible point of view to the validity of the sale, inasmuch as Congress has not seen proper to make them so. The court can introduce no substantive provision, and can make no exceptions where the statute has made none. And no Government could permit the uniform execution of its revenue laws to be interfered with by the hardship or injustice of particular cases.

Finley v. Brown, 22 Iowa R., 538; *Cooley v. O'Connor*, 12 Wallace, 391, 399–400.

If the sale for taxes were to be placed in the same category as a sale by judicial proceedings at the suit of an individual, still, under the facts of this case the court would apply the rule acted on in *Ludlow v. Ramsey*, 11 Wallace, 581, 589–590, and *University v. Finch*, 18 Wallace, 106, and not that in *Nelson v. Dean*, 10 Wallace, 158, and *Lasere v. Rocherau*, 17 Wallace, 437, since the owners of the property sold for taxes here were not forced to leave Memphis, as Nelson and Lasere were the places of their residence.

As to the claim in the bill that Perkins attempted to redeem after the sale to Keeley, little need be said. Perkins, the only witness, not only fails to prove, but rather disproves any offer to redeem. And the answer of Keely, being direct, that none was made, and his testimony exactly supporting it, the fact must be assumed to be so.

If it were admitted that the Commissioners and their records were absent from Memphis when Perkins went to redeem, which Keely testifies was not the case, and that he went within the proper time, still the law did not provide that those facts should amount to redemption, or confer on the owners any additional rights in consequence of their existence.

The right to redeem is *strictissimi juris*, and the party seeking redemption must bring himself exactly within all the provisions of the law permitting it.

Blackwell on Tax Titles, *p. 433–434, etc.

It is not claimed Keely had any agency in causing the absence of the Commissioners or their records, nor that such absence was the result of fraud on the part of any one. Besides, it appears Keely was always in Memphis, and that he and Perkins had a conversation about the redemption shortly after the sale. Why Perkins did not make *to him* the offer to redeem, and how the presence of the commissioners or their records were essential to such an offer are nowhere shown. Suppose, however, the offer to redeem was in fact properly made, and was rejected, it did not of itself amount to redemption. In order to avail themselves of such offer, and by means of it accomplish redemption, it was necessary for the owners to follow it up by a bill having for its object redemption, and with the bill to tender the amount due upon redemption. It is hardly necessary to remark that the present is not such a bill. Its object is not to redeem *from the sale*, but to have it decreed that there never was *a valid sale*.

VI.

The main, if not the only, ground on which the decision of the State court was rested, as I understand it, is this:

The Commanding General of the forces of the United States entering such insurrectionary state or district had not established the military authority of the United States throughout any parish, or district, or county of Tennessee in the sense of section 6, of the act of Congress of 7th June, 1862, when the sale under which Keely claims, was made by the Direct Tax Commissioners, and hence the Commissioners had no authority to enter upon the discharge of the duties of their office, and, therefore, no authority to make the sale to Keely.

This was one of the grounds of the decision in the case of *Buck v. Williams*, decided by the Supreme Court of Tenessee, at the April term, 1872, and was the only ground of the decision in *McKinley v. Sherry*, decided at the same term at which this case was decided, and now on error in this court, and asked to be considered along with this case. See the opinion at page 66 of the record in that case.

Now, upon this question I submit two propositions, either of which it seems to me is sufficient to determine the case in favor of Keely.

1. The sixth section of the act of 7th June, 1862, was directory merely to the Executive Department of the Government. *French v. Edwards*, 13 Wallace, 506, 511. It was enacted solely for the purpose of fixing a time when that department should proceed to carry into effect the provisions of the act; and as soon as it had been determined the military authority of the United States had been established throughout the district in which Memphis is, and the Commissioners in fact entered upon the discharge of the duties of their office, the provision as to the time when *they should do so*, so far at least as it operated as a restriction upon their official action became *functus officio*, and of no further effect. To divest or impair the rights or interests of individuals, acquired in good faith under the official acts of the Commissioners done apparently in the discharge of the duties of their office, because of an error or mistake by the Executive Department as to the time when the Commissioners should have entered on the discharge of the duties of their office would be cruel as well as unjust.

Such individuals had no power to control and no concern with the decision of the question whether the military authority of the United States had or had not been established throughout the district, or the question when the Commissioners should enter upon the discharge of the duties of their office.

When citizens saw the Commissioners, with the sanction of the Government, acting as public officers, they had the right to assume absolutely they were doing so lawfully, and to deal with them accordingly, and public policy requires there should be now no inquiry into the question whether or not they entered upon the discharge of their duties sooner than the statute authorized.

Blackwell on Tax Titles, *p. 93–97, and cases cited.

I understand the case of *Luther v. Borden*, 7 Howard, p. 1, and other cases cited below, to sustain this position in substance.

2. If in the nature of things, the question when the Commissioners should enter on the discharge of their duties was not closed as to private rights, when they in fact did enter upon them, then I insist *the fact* whether the military authority of the United States had been established throughout Shelby county when the Commissioners entered on the discharge of their duties, was by the sixth section itself to be determined by the Executive Department of the Government, which was made thereby the exclusive judge in the premises, and that Department having determined that the authority had been established and the office having been opened in pursuance of the determination, and the Commissioners having entered on their duties, the courts were thereby precluded from considering the question, and must accept the decision of the Executive Department as conclusive.

In *United States v. Morris*, 10 Wheaton, *p. 246, where an act of Congress conferred on the Secretary of the Treasury the power to determine whether the person incurring a forfeiture had been guilty of fraud or willful negligence, and if he found he had not, then to mitigate or remit the fine, or forfeiture, or penalty, or remove the disability, or any part thereof, resulting from such forfeiture, it was held that the Secretary's finding as to the fraud or negligence was conclusive, and could not be re-considered by the court.

*p. 283–285.

In *Martin v. Mott*, 12 Wheaton, *p. 19, the court held that the President was the exclusive and final judge, whether the exigency had arisen which authorized the calling forth of the militia under the act of the 28th February, 1795, 1 Statutes at Large, page 424. See page 29.

In *Foster v. Neilson*, 2 Peters, 253, 307, 309, the court held it must follow the decision of the Executive Department of the Government, on a question as to boundary between the United States and a foreign sovereign, and that it could not determine the question independently for itself.

Garcia v. Lee, 12 Peters, *p. 511, 516, etc., is to the same effect.

In the later case of *Williams v. Suffolk Insurance Company*, 13 Peters, *p. 415, the President in a message to Congress, and in a correspondence with the government of Buenos Ayres, having denied the jurisdiction of the latter government over the Falkland Islands, it was held the courts must take the fact to be so.

pp. 420.

In *Luther v. Borden*, 7 Howard, *p. 1, three propositions were decided, each one having some application here: 1. That the courts of the United States must follow the decisions of the courts of a state on the question as to what is the duly constituted government of the state. 2. That the courts of the United States are bound absolutely by the decision of the President, under the act of 28th February,

1795 (1 Statutes at Large, 424), that a government organized in a state is the duly constituted government of that state; and 3. That the Legislature is the sole judge of the existenc of the necessity which authorizes the declaration of martial law to protect the state from destruction by armed rebellion.

In *Kennett v. Chambers*, 14 Howard, 38, the court decided that before the independence of Texas had been acknowledged by the Executive of the United States, the courts must regard it as a part of the territory of the sovereignty of Mexico. This was in accordance with the former decisions in *Rose v. Himely*, 4 Cranch, 241, 272, etc., and *Gelston v. Hoyt*, 3 Wheaton, 246, 324. And in the very recent case of *Phillips v. Payne*, 92 U. S. (2 Otto), 130, it was held that as the political and judicial departments of the government of the State of Virginia, as well as Congress had since the year 1847 recognized and treated the county Alexandria as a part of the State, the courts were bound so to regard it, and could not inquire into the validity of the act of Congress by which it was retroceded to the state.

And see for a recognition of similar principles:

The Prize Cases, 2 Black, U. S. S. C. R., p. 635, 668–671. *United States v. Anderson*, 9 Wallace, 56, 68–72. The Protector, 12 Wallace 700. *Burke v. Miltenberger*, 19 Wallace, 519. *Hamilton v. Dillin*, 21 Wallace, 73.

And the Supreme Court of Tennessee applied a similar principle in *Sutton v. Tiller*, 6 Coldwell, 593, 594–595.

If the court should dissent from the positions I have stated, then I should confidently rely upon the evidence in the case proving as a matter of fact that the authority of the United States had been established throughout Shelby county prior to the time the commissioners made the sale to Keely.

The defined military lines embraced much more than Shelby county. Those lines circumscribed the extent to which the Federal authority had been established. It was not necessary to such establishment that a Federal armed force should occupy every foot of ground within the county, or should be in a position instantaneously to repel every predatory band of the enemy as soon as it appeared there. Potential power, such as prevented the establishment within the county by those in rebellion of rebel authority, was all that was required. No one can doubt the the existence of such power *at* and long before, and always after the sale at which Keely bought. In *Butler v. Maples*, 9 Wallace, 766, the court held that "where the evidence showed that a region in the South which had been previously in the possession of the rebel army, was evacuated by them, and that the citizens generally had taken the oath of allegiance or obtained protection papers, the grant of a permit by a proper treasury agent to purchase cotton, authorized by treasury regulations to be granted only in cases where the country was within the occupation of the military lines of the United States, raised at least a *prima facie* presumption of the country being within such occupation."

I confidently rely, also, on the position that the 6th section of the act 7th June, 1862, does not use the term "district" in the sense of "county,"

"parish," "township," or other established civil division of a state. Exactly what is meant, it may be difficult to determine, and may not be necessary in this case to decide.

But I cannot be mistaken in saying that a large city like Memphis, having prescribed limits, and a public charter, and a municipal government distinct from the rest of the county, and power to levy and collect taxes, and perform many other governmental acts, when occupied and controlled throughout by the army of the United States, was a "district," within the meaning of the act of Congress, "throughout which the military authority of the United States was established."

In *Sharpleigh v. Surdam*, decided by Judge Emmons, in the Circuit Court of the United States for the District of West Tennessee, a copy of which I furnish along with this brief, the very question was presented and decided.

The court held "a city, township, or subordinate taxing district, within which the military authority shall have been established, constitutes a district for the purpose of taxation," within the meaning of the act of Congress of 7th June, 1862, 12 Statutes at Large, p. 422, "although it is not a parish, district or county, within the meaning of the law of the State creating its civil and political divisions for other purposes."

See a report of the case in Western Jurist, Vol. 11 (for year 1877), page 203.

In the opinion in *McKinley et. al. v. Sherry et. al.*, before referred to, see record in No 116 on the present docket of this court, pp. 66–68, the Supreme Court of Tennessee put its decision on the ground that there was nothing to show "that the Board of Commissioners or the Commanding General assumed the fact to be that the military authority of the United States had been established throughout the county of Shelby," and the court "could not infer from the mere fact that the sale was made that the Commissioners assumed the existence of the state of facts, making the sale necessary, or that they had complied with the acts as to the mode of assessment, when these facts are not recited in their certificate or otherwise."

Now, I submit this reasoning is unsound.

The act of Congress declared that whenever "the military authority of the United States had been established throughout a parish, district or county" of an insurrectionary state, the Direct Tax Commissioners should enter upon the discharge of the duties of their office, and should open one or more offices for the transaction of business.

Therefore the entering upon the duties of their office by the Commissioners and the opening an office in any particular district, was an assumption that the military authority of the United States had been established throughout the district.

The act of Congress required no formal dermination that the authority had been so established, and required no record of such determination, and did not prescribe that the certificates of purchase granted by the Commissioners should recite any such fact, or should contain any recitals at all.

It would be strange indeed if the power of the Direct Tax Commissioners to exercise the duties of their office *in general* in a particular parish, district or county should be open to inquiry in every individual case, and should be made to depend upon the proof or want of proof in each case of the facts necessary to confer such power.

I submit that the opening by the Direct Tax Commissioners of their office for the transaction of business in Memphis, and the entry upon the discharge of their duties, necessarily was, or else pre-supposed and was evidence of, the final decision in the affirmative by the proper authority of the question whether the military authority of the United States had been established throughout the district.

"Acts done which pre-suppose the existence of other acts to make them legally operative are presumptive proofs of the latter."

Bank of United States v. Dandridge, 12 Wheaton, p. 70; *Lessee of Winder v. Sterling* 7 Ohio (Pt. 2), p. 190; *Williams v. East India Co.*, 3 East, 192; *Robinnett v. Preston*, 4 Grattan, 141.

One consideration alone, it appears to me, is sufficient to determine that the general authority of the Direct Tax Commissioners is not open to discussion in every private lawsuit which may involve their official acts.

It is this: If such a question was open in every case as one of fact to be decided upon the proof in the particular case, different courts and juries, in different cases, or the same courts and juries in different cases, according to the evidence before them, would or might arrive at conclusions directly the reverse of each other. In one case the power to act officially would be held to exist, and in another not to exist, and there could be no uniformity of decision, and no final settlement of the question. Such a state of uncertainty in the administration of the law would be destructive of the very ends for which courts of justice are instituted.

VII.

The next objection is that the acts of Congress under which the sale was made are unconstitutional.

While the decided cases do not refer to the constitutionality of the legislation in direct terms, I take it they must be considered to settle it, as the court could hardly have omitted raising and deciding the question in some of them, had it not considered it settled.

Bennett v. Hunter, 9 Wallace, 326; *Corbett v. Nutt*, 10 Wallace, 464; *Cooley v. O'Connor*, 12 Wallace, 391; *Turner v. Smith*, 14 Wallace, 553; *Tacy v. Irwin*, 18 Wallace, 548, and other cases.

If, however, the question is open I respectfully refer to the authorities already cited, particularly *Murray's Lessee v. Hoboken Land and Improvement Company*, 18 Howard, 272, and *Pullan v. Kinsinger*, 2 Abbott's U. S. Rep., p. 94.

VIII.

The last objection attacks the assessment as partial, excessive, erroneous, irregular, oppressive and void.

It will scarcely be seriously insisted on the other side that there was any defect in the assessment rendering it void. On what particular facts or omissions the other objections are grounded, is not pointed out. But, if the defects were patent, or established beyond doubt, the time to take advantage of them was anterior to the sale. It is too late now, after the assessment has been merged into a forfeiture under the act of Congress, and a sale, as therein prescribed, to urge them to defeat the title of a purchaser.

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Oct. 1, 1878.